Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

ARTHUR SCHREIBER,

Petitioner,

vs.

UNITED STATES OF AMERICA, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, TOSHIA MUNDY, WILLIAM MAYS, and TAMMIE LATHAM,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err as a matter of law in holding that a provision in a Settlement Agreement that defined a Renovation Period was unambiguous when it considered only one component of the definition and ignored the second conflicting component of the definition.

2. Did the Court of Appeals err as a matter of law in holding the admitting of irrelevant evidence concerning the physical condition of low income rental projects is harmless error, when the reason for this holding is based upon information derived from the improperly admitted evidence.

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NO.

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OPINIONS BELOW

The bench trial of this case before the Hon. Carl B. Rubin, Judge of the United States District Court for

the Southern District of Ohio, Western Division culminated in the Findings of Fact, Opinion and Conclusions of Law, filed on January 4, 1994. This decision was affirmed by the United States Court of Appeals for the Sixth Circuit in a decision that was announced from the bench without a written opinion on March 13, 1995.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES

There are no statutes that are relevant to the disposition of this case.

STATEMENT OF THE CASE

This case arises out of Petitioner Schreiber's operation of four low income housing projects which participate in HUD's § 8 program. The names of the projects are: Lexington, St. Marks, Virginia and Woodburn-Clayton. As a participant in the § 8 program, Schreiber was subject to the provisions of a Regulatory Agreement, a Housing Assistance Payment (HAP) Contract and a mortgage on each property. These Regulatory Agreements, HAP Contracts and mortgages all require the owner to provide safe, decent and sanitary housing to the tenants of the projects.

On March 22, 1993, Respondent, United States of America, Department of Housing and Urban Development (hereinafter, HUD) filed a complaint against appellant, Arthur Schreiber. HUD sought to become a mortgagee-in-possession (MIP) of Schreiber's projects alleging that the physical condition of the

projects was so poor as to constitute a breach of the mortgages, regulatory agreements and HAP contracts. On May 3, 1993 Schreiber filed an answer and counterclaim against HUD. In his answer Schreiber raised the defense that, by virtue of the provisions of a Settlement Agreement between HUD and him, Schreiber was not responsible for the current physical condition of the projects and, therefore, was not in breach. As a counterclaim Schreiber requested a declaratory judgment of his rights under the Settlement Agreement. On May 10, 1993 Toshia Mundy, William Mays and Tammie Latham, tenants in the Schreiber projects, moved to intervene. The motion to intervene was granted on June 28, 1993. Tenants-intervenors sought the same relief as HUD.

The history of the Settlement Agreement is as follows: On or about June, 1989 HUD suspended § 8 subsidies to Schreiber's projects. HUD's stated reason for this action was that Schreiber failed to maintain the projects in safe, decent and sanitary condition, and that Schreiber had failed to provide management of the project and refused to replace himself with professional management that was satisfactory to HUD. On January 5, 1990 four individual tenants from St. Marks and Woodburn-Clayton filed a lawsuit in the United States District Court, Southern District of Ohio, Western Division, against HUD and Schreiber as codefendants, styled as, *Theresa Taul, et al. vs. Arthur Schreiber, et al.*, Case No. C-1-90-005.

Sometime around August, 1990 the parties attempted to reach a settlement of the *Taul* case. These efforts culminated in a Settlement Agreement which was executed by the parties on March 21, 1991.

The Settlement Agreement provides that for three (3) years (the Management Period) the projects will be operated by a manager appointed by Schreiber and approved by HUD. The Settlement Agreement contains the restriction that Schreiber shall have no participation or even voice in the management or operation of the projects during the Management Period.

The Settlement Agreement further defines a "Renovation Period," which starts at the beginning of the three-year "Management Period." Specific reference to the "Renovation Period" is as follows:

> By no later than six (6) months after the start of the Management Period, the Manager shall physically renovate each project to conditions that meet HUD's Housing Quality Standards (HQS) at a "Satisfactory" level, based upon a HUD inspection of each project. This period shall be referred to as the "Renovation Period."

The Settlement Agreement specifies both the source of funds that will be used to pay for the renovations and the source of funds that will not be used for the renovations. The funds to be used are described, as follows:

> Funds used to make the required repairs necessary to reach HQS shall come from the suspended Section 8 payments (less mortgage and utility payments owed to HUD and less payments previously made by HUD on behalf of ineligible tenants), and the Reserve for Replacement Escrow Accounts, as well as all other project

> income. The amount of Funds are not less than $13,598 for St. Marks I and $46,246 for Woodburn-Clayton.

The source of funds not to be used are described, as follows:

> Schreiber will not be required or expected to provide any additional financial support for the renovation of the projects during the renovation period.

The Settlement Agreement also contains the following provision:

> This Agreement shall not be construed to limit or expand Schreiber's rights, duties, and responsibilities as owner and mortgagor (including those under the Housing Assistance Payments Contracts and Regulatory Agreements) except as expressly stated therein.

Pursuant to his obligation under the Settlement Agreement, Schreiber appointed Model Management, Inc. (hereinafter, "Model") as Manager. Model and Schreiber executed a Management Agreement with an effective date of February 1, 1991. Model assumed management responsibilities or the Schreiber projects on February 1, 1991 and continued in that position until it resigned, effective July 31, 1992.

In August, 1991, approximately six months after the effective date of the Settlement Agreement, HUD conducted a Management Review, which included a partial physical inspection of the Projects, and found Virginia and Woodburn-Clayton to be "Satisfactory"

and Lexington and St. Marks to be "Below Average. In January and February, 1992, approximately one year after the effective date of the Settlement Agreement, HUD conducted a Physical Inspection of the projects and found them all to be in "Fail" condition.

Model presented HUD with a plan for correcting the cited deficiencies in the Physical Inspection Reports. This plan was based on a gradual approach, utilizing the funds which the projects were then generating. HUD rejected this approach. It wanted the renovation to be completed in a much shorter period of time. This created an impossible situation for Model. After 18 months, the project funds had been exhausted, but the renovation objective had not yet been accomplished. According to Mr. Reckman, president of Model, HUD's insistence on rapid completion of the renovations would require the expenditure of an estimated $400,00-500,000. At that point, Model requested Schreiber to advance personal funds to the projects. When Schreiber refused to comply, Model resigned.

This situation demonstrated that there was an ambiguity in the Settlement Agreement. The Settlement Agreement is silent on what is to happen in the event that the Manager fails to complete the renovations to HQS, "by no later than six (6) months." It is also silent on what is to happen if the money made available to the manager are depleted before the required renovations are completed. And it is silent on what is to happen if the manager expends money and effort in areas that did not address the prob'ems that HUD considered to be top priority, and which had to be addressed in order to obtain HUD's "satisfactory" approval.

REASONS FOR GRANTING THE WRIT

This Court should exercise its discretion and grant a review on Writ of Certiorari for the following reasons:

1. The Sixth Circuit did not consider that the Settlement Agreement defined the Renovation Period in terms of two factors: a time factor and an action factor. The Sixth Circuit considered only the time factor and ignored the action factor. For this reason it was misled to conclude and to hold that the Settlement Agreement was not ambiguous.

2. The Sixth Circuit held that admitting clearly irrelevant evidence concerning the physical condition of Schreiber's projects was harmless error. However, it was prejudicial error, as can be seen from the circular reasoning by Sixth Circuit that this was harmless error because "the overwhelming evidence of the condition of the premises during the period in question."

ARGUMENT

The decision of the Sixth Circuit, if permitted to stand, would constitute a departure from the accepted and usual course of judicial proceedings, and by affirming the trial court, would sanction such a departure by a lower court, so as to call for an exercise of this Court's powers of supervision.

The Sixth Circuit failed to understand the nature of the ambiguity which it was required to resolve. The clause in the Settlement Agreement that defines the Renovation Period is comprised of two components. The first is the time components which reads, "By no later than six (6) months ..." The second is the action component which reads, "... the Manager shall renovate ..." These components are concurrent and co-equal. There is no indication in the Settlement Agreement that in the event of a conflict between them, that one component predominates the other.

The Sixth Circuit, following the rationale of the trial court, ignored this fact and focused exclusively on the first component. It clearly held that the Renovation Period is the definite six month period which began on February 1, 1991 and terminated on August 31, 1991. Such an analysis fails to answer the question of whether the Renovation Period can expire if, upon the passage of six months from February 1, 1991, the Manager has not yet completed his assigned task renovating the projects. This is Schreiber's question.

Resolving this ambiguity requires the court to consider parole evidence. While such evidence was presented to the trial court, the trial court did not consider this evidence, because it held that the

Settlement Agreement was not ambiguous. The Sixth Circuit also ignored this compelling evidence for the same reason.

There may be a reason for this. The reason is that the trial court erroneously admitted into evidence and considered, in detail, reports of HUD inspections of Schreiber's projects dating back to the time that he acquired them. Frankly, these reports do not present Schreiber in a favorable light. At trial Schreiber objected to the admission of these reports into evidence, and on appeal, the Sixth Circuit held that even if these reports were inadmissible, such error is harmless. However, the error was quite prejudicial, since it blinded both lower courts to the critical analytical fact that the definition of the Renovation Period was more than merely the passage of six months.

While the subject matter of this case is HUD low income rental projects, this is simply a case of contract interpretation. Schreiber admitted at the outset the physical condition of the projects constituted a default under the Regulatory Agreements, HAP Contracts and mortgages, and he dismissed his counterclaims except the declaratory judgment. Thus, the entire trial was devoted to Schreiber's defense, which was purely contractual. Therefore, admitting evidence on the condition of the projects, was totally irrelevant. While the Sixth Circuit maintains that this was harmless error, its opinion proves the opposite. The reason given by the Sixth Circuit for its holding of harmless error is, "the overwhelming evidence of the condition of the premises during the period in question."

This is not a case of great national importance, nor one that raises serious constitutional issues.

However, it is a case where Schreiber did not receive a fair hearing of his defense at the trial court, and then he failed to have a proper review of his position on appeal. This case is very important to Schreiber, because he has lost four projects that he owned and operated and thereby earned a living for eight years. Now, he is about to lose these properties in foreclosure. What was a good deal for Mr. Schreiber when he acquired the projects (i.e., the non-recourse loans), will become a nightmare in terms of the Federal Income Tax consequences of the foreclosure. If he had received a fair hearing, Mr. Schreiber would more readily accept the judgment of the lower courts.

Since a fair trial is the ultimate goal of the judicial system, it is imperative that this Court exercise its supervisory powers to demonstrate its continued commitment to this goal.

CONCLUSION

WHEREFORE, Petitioner respectfully prays the Court to grant a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to reverse the decision of said court.

Dated: Cincinnati, Ohio
June 9, 1995

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APPENDIX

CASE NO. 94-3144

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, DEPARTMENT
OF HOUSING AND URBAN DEVELOPMENT,

Plaintiff-Appellees

and

TOSHIA MUNDY; WILLIAM MAYS;
TAMMIE LATHAM,

Intervenors

vs.

ARTHUR SCHREIBER,

Defendant-Appellant

On Appeal from the United States District
Court For the Southern District of Ohio
Western Division
District Court Case No. C-1-93-183

Argued March 13, 1995
Before: LIVELY, RYAN and DAUGHTREY,
Circuit Judges

Order Filed March 14, 1995

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OPINION OF THE COURT

RYAN, Circuit Judge.

Under the rules of the United States Court of Appeals for the Sixth Circuit the Court is, with increasing regularity, identifying cases to be disposed of. You can have a seat Mr. Groner. The cases to be resolved with an oral opinion from the bench, the Rule is 19. These cases are selected under the criteria of the Rule which include that the members of the Court must be unanimous in their view as to the proper disposition of the case and the issues in the case must be such that there is no significant jurisprudential value to be gained from the preparation and publication of a written opinion or even the preparation of an unpublished opinion. The Rule is

generated in part because of the burgeoning case load in this Circuit and because the criteria for the Rule make it self evident of its value. This is such a case. I might add that these cases are not selected because they are simple or unimportant. They are selected because the Court is required to make the choices as to where it will invest its time in the preparation of written opinions. In this instance the Court is of the view that the correct resolution of the four issues presented do not, will not, provide, supply a jurisprudential significant opinion for the profession and the Court's view is that the judgment of the lower court should be affirmed.

The first issue is whether the District Court erred in holding the Settlement Agreement did not relieve Mr. Schreiber of his obligation to provide funds for maintaining the buildings in a safe, decent and sanitary condition. The underlying issue there is, as counsel has indicated so well, whether there was a Renovation Period of six months running from February 1, 1991 after which Mr. Schreiber would be obligated to provide funds if requested by the managing agency. The Court's view is that the District Court did not err in it's conclusion. There was a discreet and discernable Renovation Period of six months running from February 1, 1991. The Settlement Agreement recited that the Renovation Period duration would begin on February 1, 1991--the commencement of the Management Period. Contrary to the defendant's reading of Section 12(b), however, the Settlement Agreement does not seem to establish a mere goal of finishing the renovations in six months. The section begins with the language, "by no later than six months from the commencement of the management period"--hardly the language of aspiration--and the section concludes by naming the

period the Renovation Period. And in the Management Agreement between Mr. Schreiber and Model it was specifically declared that the Renovation Period would last six months starting February 1, 1991. That is consistent with the lawsuit Settlement Agreement definition. Although Mr. Schreiber contends that he and Model could define Renovation Period differently in the Management Agreement, the Court observes that the Settlement Agreement was entered into after the Management Agreement. And so, in light of the Settlement Agreement's mirror definition of Renovation and the incorporation of the Management Agreement, the only reasonable interpretation is that the Settlement Agreement was for a six month period. I think the court did not error in that respect.

The second issue: Whether the District Court erred in holding that the Settlement Agreement did not strip Mr. Schreiber of all of his managerial authority and that he was not relieved of his obligation to maintain the building in a safe, decent and sanitary condition. The Court agrees once again that the District Court did not err in concluding that Mr. Schreiber had not been stripped of all of his obligations. The Management Agreement between Model and Mr. Schreiber did not, as the government has pointed out, include the Department of HUD as a party to the agreement. The District Court observed correctly that Mr. Schreiber was relieved of many of the day to day managerial duties which would ordinarily be imposed on a manager. But there was no relief of Mr. Schreiber, for Mr. Schreiber, of his duties as they were described in the three underlying documents, the mortgages, the regulation agreements, and in the so called HAP agreements with HUD. And those three documents, signed with HUD collectively,

continued to impose on Mr. Schreiber, as the District Court pointed out, the obligation to maintain the place in a safe, decent, the buildings in a safe, decent and sanitary fashion. Secondly, the District Court correctly pointed out that the Settlement Agreement declared that, unless expressly stated, the Agreement did not limit Mr. Schreiber's duties as owner and mortgagor. And finally with respect to this issue, and perhaps most importantly, the language of the governing documents seem to authorize default; the governing documents being the mortgage, the regulatory agreements and the HAP agreements. For example, the mortgages required Mr. Schreiber to commit or suffer no waste to the buildings. By disregarding his duty to provide renovation and maintenance funds after the six months renovation period the Court did not err in concluding, in effect, that Mr. Schreiber suffered waste of the projects in violation of the three underlying documents to which I have made reference.

The third issue is whether the court abused its discretion in admitting exhibits documenting the condition of the buildings from 1982-1990. As counsel are well aware, the admission of those documents is a determination of relevance under the Federal Rules of Evidence, Rule 401, rulings concerning which this Court reviews for abuse of discretion. In this instance it is suggested that the documents, while not reflective of the condition of the premises for the period year under scrutiny, nevertheless provided background material and thus were admissible. Although, the Court has some question about the relevancy in strictly analytical terms of these exhibits of 1980-1992, it is clear that if they were not relevant under 401, there certainly was no harmful error caused by their admission in evidence, because the harmless error rule, as you know, with regard to the admissibility of

allegedly irrelevant evidence, is that we assess the likelihood that the error affected the outcome of the case. [Discontinuity between tape cassettes] remoteness, their receipt in evidence did not effect the outcome of this case in view of the overwhelming evidence of the condition of the premises during the period in question.

And finally, the fourth issue is whether the District Court clearly erred in finding Mr. Schreiber's counterclaims frivolous. Frivolity in pleading is a term of art of which counsel are very familiar. The District Court, we think, did not err in dismissing the counterclaims as frivolous. It appears that the District Court disposed of the breach of the Settlement Agreement theory of the counterclaim by finding that HUD did not breach the Agreement and the District Court disposed of the agency misconduct claim counterclaim by holding that the Court didn't have any jurisdiction. We decline to pass on the question as whether the Court had jurisdiction over that second claim of the counterclaim. But the District Court also went on say that he thought the allegation of the counterclaim, that there was agency misconduct, had little merit. We are satisfied that on this record it has no merit and, therefore, that the District Court did not err in dismissing the counterclaims.

For those reasons the judgment of the District Court is affirmed. The judgment of the District Court putting the mortgagee in possession of the four apartments owned by Mr. Schreiber is affirmed. And the judgment of the District Court dismissing the counterclaims after the bench trial is also affirmed.

A copy of this oral explanation of the Court's reasoning is available on audio tape and judgment will be entered. Thank you.

Transcribed from an audio tape by Simon Groner, Attorney for Petitioner.

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Kenneth J. Murphy, Clerk
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA, et al.

Plaintiffs,

v. C-1-93-183

ARTHUR SCHREIBER,

Defendant.

FINDINGS OF FACT, OPINION
AND CONCLUSIONS OF LAW

This matter is before the Court after trial on November 30, December 1, and December 2, 1993, at which time testimony and evidence was presented. Plaintiff, United States Department of Housing and Urban Development ("HUD") asserts the right to become mortgagee in possession of real estate belonging to Defendant, Mr. Arthur Schreiber ("Schreiber"). Plaintiff-intervenors ("tenants") are low-income tenants who reside in Schreiber's projects and assert, along with HUD, that Schreiber has violated his obligations under federal law to maintain the housing projects in a decent, safe and sanitary condition. Defendant has counterclaimed asserting

damages against the United States. In accordance with Rule 52, Fed. R. of Civ. P., the Court does submit herewith its Findings of Fact, Opinion and Conclusions of Law.

I.

Findings of Fact

1. In July and August, 1981, the Defendant, Arthur Schreiber, purchased four parcels of property in the City of Cincinnati: the Virginia Apartments at 624-630 Rockdale Avenue; the Woodburn-Clayton Apartments at 2712-2716 Woodburn Avenue; the Lexington Apartments at 334-349 Forest Avenue; and the St. Marks Roman I Apartments at 770 Ridgeway Avenue, totalling 108 units combined. All four parcels consisted of apartment buildings designed for low income tenants. All four were acquired from the Housing and Urban Development Department (HUD) and were secured by mortgages from HUD. Those mortgages were nonrecourse. Mr. Schreiber as the owner and mortgagor assumed no personal liability. The premises in question served as the only security for repayment of the loan. As a condition of the mortgages, Schreiber entered into a Regulatory Agreement with HUD. The regulatory agreement is a contract that specifies the rights and duties of Schreiber in the operation of the financed projects.

2. Schreiber and HUD also entered into a Housing Assistance Payments ("HAP") Contract for each project. Under HUD's jurisdiction is a rent supplement program known as the "Section 8 Housing Subsidy." Under this program HUD will pay 70% of a qualifying tenant's rental in accordance with an

approved HUD rental base. The owner of the premises is at liberty to collect the other 30% from the tenant directly.

3. All four properties are old and have been subjected to hard use. The tenants tend to come and go with more frequency than tenants in higher rent properties. There is often vandalism and misuse of the premises and such buildings tend to attract drug transactions, destruction of premises and use by nontenants.

4. The HUD programs of mortgage and rent subsidies are acts of the United States Congress intended to deal with problems of housing of low income tenants.

5. The HAP contracts at Part II, clause 2.5(c), p.5 require Schreiber to "maintain and operate the Contract units...and related facilities to provide Decent, Safe and Sanitary housing..." In addition, the Regulatory Agreements require Schreiber to "maintain the [project], accommodations and grounds and equipment appurtenant thereto, in good repair and condition." (Joint ex. I; Stipulation 3). The parties agree that the standard to be applied by the Court is that of decent, safe and sanitary housing in accordance with 24 C.F.R. § 886-307. The parties also agree that a compliance with housing quality standards (HQS) will maintain a living unit in a decent, safe and sanitary condition. It is further agreed by the parties that the four properties involved do not meet either the standards of decent, safe and sanitary, nor the standards of HQS.

6. In 1991 two events occurred. On February 1, 1991, Mr. Schreiber, as owner of the four

premises involved, entered into a management contract with Model Management, Inc., whereby that company would undertake the management and the repair of the projects to bring them up to HQS standards (Joint Ex. 8). The Management Agreement was in part a result of the dissatisfaction of HUD of the manner in which these properties were managed.

Upon the request of Schreiber, HUD provided a list of managers currently managing similar properties that it approved and evidently, Schreiber selected Model Management, Inc. from that list. No creditable evidence was presented to the Court that Mr. Schreiber was forced to accept someone on the approved list, nor that the presentation of such list was at the instance of HUD.

In March, 1991, and as a result of a lawsuit entitled Taul, et al. v. Arthur Schreiber, et al., C-1-90-005, United States District Court for the Southern District of Ohio,[1] a settlement agreement was entered into (Joint Ex. 10). In this settlement agreement certain funds held in reserve by HUD were released for the purposes of making repairs to the properties in question. The settlement agreement referred to "management" and noted that Model Management, Inc. had been selected as the manager for a period of three years. The management period began February 1, 1991, for a period of three calendar

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[1] In January 1990, four tenants (not parties to the instant case) residing in Schreiber's properties brought suit against Schreiber and HUD, based on Schreiber's alleged mismanagement and neglect of the properties and HUD's alleged failure to take meaningful corrective action.

years. Within the management period there was also a "renovation period." It required that no later than six months after the start of the management period, there would be a physical renovation of each project to conditions that met the HQS at a satisfactory level. Since the management period began February 1, 1991, the renovation period would terminate August 1, 1991. Certain funds were to be used to reach HQS and those funds amounted to $184,226.00.[2] In connection with the funds the settlement agreement specifically provided: "Schreiber will not be required or expected to provide any additional financial support for the renovation of the projects during the renovation period." (emphasis added) (Joint Ex. 10-4). It should be noted in this regard that Schreiber's refusal to provide additional funds, in the post-renovation period, occurs in other exhibits and in his testimony before the Court. (i.e. Joint Ex. XXXVI).

7. It is not questioned that the amount to reach the HQS varied substantially depending upon who inspected the premises and the passage of time.

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[2] Back § 8 Funds* = $ 93,782.00
+
Reserve Funds = $ 70,444.00
+
Loan from Garden Lane** = $ 20,000.00
$184,226.00

* Following the 1989 inspections, HUD suspended the section 8 subsidies to Schreiber. This number represents the total subsidy that was withheld.
** Garden Lane is another Schreiber property with a HUD mortgage but it is not subject to this case.

Model Management, Inc. continued as manager for approximately fifteen months. During that time approximately $184,000.00 was expended in repairs to the premises. Model Management, Inc., in the Spring of 1992. determined that there was insufficient funds to complete the job and that even though it had negotiated a 40% rent increase from HUD, the funds generated thereby were insufficient. Model Management determined that approximately $165,000.00 would be needed to address other HQS repair obligations that were cited by HUD, (Joint Ex.XXXII). Model Management requested additional funds from Schreiber (Joint Ex. XXXII) which he declined to provide. Upon the recognition therefore that there were neither funds immediately available from the operation of properties nor from HUD or Schreiber, Model Management determined that it could not perform its function and resigned.

8. Periodically, HUD conducts a physical inspection of the each property and a review of management and operations. The results of the review and inspection are summarized in a report that is provided to the owner and is kept as a HUD record. As part of that report, HUD assigns a rating to each project: Unsatisfactory, Below Average, Satisfactory, Above Average and Superior. Schreiber's record as a manager of the property prior to the agreement with Model Management consists of the following:

(A) Virginia Apartments: Between July 10, 1982 and November 6, 1990, the premises were inspected fourteen times. Only two of those inspections were "satisfactory." The first inspection on March 10, 1982, and an inspection on September 25, 1984. The other twelve inspections were either "below average" or "unsatisfactory."

(B) Woodburn Clayton Apartments: This property was inspected eleven times between March 10, 1982 and November 6, 1990. Of these eleven inspections, two were satisfactory and all others were either "below average," "unsatisfactory," or "failed." The inspection of September 25, 1984, is listed as "Not Specified."

(C) The Lexington Apartments: Inspections were performed ten times between March 28, 1984 and November 6, 1990. On two occasions the premises were listed as "satisfactory" and once they were listed as "Passed" at all other times, they were either "Unsatisfactory" or "Below Average."

(D) St. Marks Apartments: This property was inspected fifteen times between December 22, 1982, and November 16, 1990. Of the fifteen inspections there was a satisfactory rating three times and in all other instances the rating was either "Below Average," "Unsatisfactory," or "Failed."

Analysis of these inspections indicates a pattern. In the case of each building the first inspection after Mr. Schreiber obtained ownership was "Satisfactory." The other "Satisfactory" as to Virginia Apartments, Woodburn Clayton Apartments and Lexington Apartments occurred in 1984: On May 24th (Woodburn Clayton), September 25th (Virginia) and March 28th (Lexington). St. Marks received the "Satisfactory" rating on September 25, 1984 and October 23, 1985. There is reason to believe that one such rating in the case of each premises occurred in the beginning of Mr. Schreiber's management and may well have been the results of prior activities.

The conclusion that Mr. Schreiber did not manage the premises consistent with the standards of HUD is also found in the testimony of Derry Loftus, Arthur Reckman and John Dotson, all of whom testified for the Plaintiff. In seeking to establish a standard for the condition of these buildings, it is necessary to recognize that they are all quite old, all subjected to low income tenants (locations where vandalism, criminal acts and drug transactions are frequent), and that the deterioration below standard will accelerate if maintenance is not appropriately conducted. In the context of these limitations all three witnesses testified that the premises were below the standard that one might expect from such types of buildings.

Specific comments of witnesses in this regard are instructive. Witness Derry Loftus stated: "In comparison with other equivalent buildings, these would be unsatisfactory." Witness Arthur Reckman stated: "The property is substantially below similar properties." John Dotson stated: "[These properties] are bottom of the barrel in comparison with other projects of similar age and occupancy by similar tenants."

9. The condition of these buildings at the time of trial is that units thereof do not meet HQS standards. There are no withheld funds that will bring them up to such standards. Mr. Schreiber has repeatedly refused to contribute funds although at trial he conditionally offered to contribute funds assuming management was restored to him and the only source of funds is within HUD itself. If HUD is willing to contribute funds to bring all units to the HQS standards and if the condition of HUD is that it will only do so if it is made mortgagee in possession, then

the choices available to the court are limited to: [1] grant mortgagee in possession status to HUD; or [2] direct that these premises be shut down. For the Court to take the latter course, it would mean that 108 housing units would be removed from the market.

II.

OPINION

The mortgage agreement between HUD and Schreiber for each property requires Schreiber to commit or suffer no waste of the property and to maintain the buildings in good condition and repair. The Regulatory Agreements and HAP contracts between HUD and Schreiber require Schreiber to maintain the projects in good repair and condition. Additionally, HUD regulations require Schreiber to maintain the projects in decent, safe and sanitary condition, 24 C.F.R. sections 886.318 and 886.323, and in compliance with detailed Housing Quality Standards, 24 C.F.R. section 886.307.

Upon finding Schreiber in default: 1) under the mortgage, HUD is entitled to the appointment of a receiver by the court to take possession of and operate the projects; 2) under the Regulatory agreements, HUD may take possession of and operate the projects until HUD determines that the owner is again in the position to operate the projects in accordance with the terms of the Regulatory Agreement; and 3) under the HAP contracts, HUD may take possession of and operate the projects and apply to any court for the appointment of a receiver and other appropriate relief.

Schreiber maintains that he was absolved of financial responsibility for the repair of the projects by

the terms of the settlement agreement that had ended the earlier lawsuit with regard to these projects.[3] However, that argument is clearly against the weight of the evidence. First, the settlement agreement clearly sets out that "Schreiber will not be required to provide additional financial support for the renovation period of the projects during the renovation period." (Jt. Ex. X, p. 4). The 'renovation period' is defined within that agreement as follows:

> By no later than six (6) months after the start of the management period, the manager shall physically renovate each project.... This period shall be referred to as the "renovation period."

(Jt. Ex. X, p. 3-4). Accordingly, the renovation period started February 1, 1991 and ended August 1, 1991. During that time frame, and that time frame only, was Schreiber not required to contribute personal funds.

Second, despite Schreiber's protestations to the contrary, Schreiber's being removed as manager of the projects did not absolve him of responsibility as owner of the projects. The settlement agreement clearly states:

> This agreement shall not be construed to limit or expand Schreiber's rights, duties and responsibilities as owner and mortgagor (including those under the Housing Assistance Payments Contracts

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[3] Taul, et al. v. Schreiber and HUD, Case No. C-1-90-005 (U.S. Dist. Ct., S.D. Ohio, 1/5/90).

> and regulatory agreements) except as expressly stated herein.

(Joint Ex. X; Stipulation 13). In the settlement agreement, Schreiber was prevented from doing the day-to-day management activities and was relieved of the obligation of filing the management paperwork with HUD, however, he retained, without limitation, the right to on-site inspections, to be notified of and present at any HUD inspections, to receive copies of all management paperwork submitted to HUD and to meet with the manager to review the status of the projects and overview the management itself. Additionally, Schreiber had the ability to hire and fire the managers over the property. (Joint Ex. XXXVI-2). The only condition on that, and it was a condition that was in place from when Schreiber first bought the projects, that any manager hired had to have HUD approval.

Mr. Schreiber's obligations and duty to maintain the projects in a safe, sanitary and decent condition continued to be governed by the terms of the Mortgage, Regulatory Agreement and HAP contracts applicable to the projects, and these duties and obligations were outside of the scope of the settlement agreement.

Mr. Schreiber also argues that he cannot possibly be held liable for the poor condition of the projects as he has not been manager since the settlement agreement and that if he was the manager the projects would not be in the condition they are today.

During the first six months of the management period, Model Management was able to make

emergency repairs and fix some vacant apartments for occupancy. Indeed, occupancy did increase after these improvements. However, even with the increase in rents from new occupants and the rent increase approved of by HUD, there simply was not enough money to allow Model Management to make all the necessary improvements and corrections in the projects directly as a result of Schreiber's neglect and poor management from the previous ten years.

Mr. Schreiber has taken a "laissez-faire" approach his HUD projects and has attempted to use the settlement agreement as a shield from liability for this approach. However, he adopted this approach at his own peril. Over the period of Schreiber's ownership these projects have fallen into serious disrepair and underprivileged people are being forced to live in conditions that no human should be forced to live in for lack of any other alternative. The evidence demonstrated that many of the HQS violations that were cited by HUD in March of 1992 have not been corrected.

Accordingly, this Court finds that Mr. Schreiber has failed to maintain his projects in safe, sanitary and decent conditions in default of the HAP Contracts, that Mr. Schreiber has committed or suffered waste of said property by failing to maintain and keep the buildings, fences and other improvements erected on said property in good condition and repair in default of the mortgages and that Mr. Schreiber has failed to maintain the projects, accommodations and grounds and equipment thereto in good condition or repair in default of the Regulatory Agreements. In accordance with those documents and in the best interests of the tenants in those projects, the Court hereby places the Department of Housing and Urban Development as

mortgagee-in-possession and directs that HUD, forthwith, make all corrections necessary to immediately restore those projects to a safe, sanitary and decent condition.

III.

CONCLUSIONS OF LAW

A. This Court has jurisdiction pursuant to 28 U.S.C. sections 1331, 1337, 1345, and 2201.

B. The mortgage agreements between HUD and Schreiber require Schreiber to commit or suffer no waste of the property and to maintain the property in good condition, which Schreiber has failed to do. Accordingly, Schreiber is in default of his mortgage agreements with HUD and HUD is entitled to take possession of and operate the projects.

C. The Regulatory Agreements and HAP contracts between HUD and Schreiber require that Schreiber maintain the projects in good repair and condition, which Schreiber has failed to do. Accordingly, Schreiber is in default under both agreements and HUD may take possession of and operate the projects.

D. HUD regulations require Schreiber, as owner, to maintain the projects in decent, safe and sanitary conditions and in compliance with detailed Housing Quality Standards, which Schreiber has failed to do. 24 C.F.R. sections 886.318, 886.323 and 886.307.

E. The Taul settlement agreement does not in any way limit Schreiber's obligation, as owner, to provide the necessary funding to maintain the projects

as required by the mortgages, the regulatory agreements and the HAP contracts, except during the six-month renovation period that lasted from February 1, 1991 through August 1, 1991.

F. Schreiber is in breach of his obligation under the Mortgages, Regulatory Agreements and HAP Contracts with HUD due to his failure to maintain the projects in a decent, safe and sanitary condition. As a result of said breach, HUD has demonstrated its right to become mortgagee-in-possession of the Schreiber projects of the Virginia, Woodburn-Clayton, St. Mark's I and the Lexington Apartments. Schreiber is hereby ordered, forthwith, to surrender the premises above to HUD as mortgagee-in-possession.

G. Schreiber's counterclaims are hereby dismissed as frivolous. HUD did not breach its duties under the settlement agreement and this court is without jurisdiction to hear the Agency misconduct claim as the United States has not waived sovereign immunity. Even if this were not so, that claim has little merit.

H. The purpose of the National Housing Act, 42 U.S.C. sections 1437, et seq., is "to provide decent, safe, sanitary and affordable housing to families of low income." 42 U.S.C. section 1437. The implication of an implied private cause of action to the plaintiff-intervenors to enforce their rights in this instance will assist in meeting the goal of the National Housing Act. Howard v. Pierce, 738 F.2d 722 (6th Cir. 1984), See Wright v. Roanoke Redevelopment and Housing, 479 U.S. 418 (1987).

I. It is hereby ordered that HUD be given possession of the projects as mortgagee-in-possession and is hereby permitted to operate the projects, and

collect rents, profit and income therefrom. HUD is also directed, forthwith, to make all necessary repairs and corrections to bring these projects immediately to decent, safe and sanitary conditions.

J. In accordance with the foregoing, Judgment for the plaintiffs at defendant's costs.

LET JUDGMENT ISSUE IN ACCORDANCE WITH THE FOREGOING.

IT IS SO ORDERED.

/s/ Carl B. Rubin
United States District Judge

Case No: 94-3114

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

UNITED STATES OF AMERICA, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT;

Plaintiff - Appellee

TOSHIA MUNDY; WILLIAM MAYS, TAMMIE LATHAM

Plaintiffs - Intervenors

v.

ARTHUR SCHREIBER

Defendant - Appellant

BEFORE: LIVELY, RYAN and DAUGHTREY, Circuit Judges.

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The court finds no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore **ORDERED** that said judgment be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green, Clerk

CERTIFICATE OF SERVICE

I, Simon Groner, a member of the Bar of the Supreme Court of the United States and Attorney of Record for Arthur Schreiber, Petitioner herein, hereby certify that, pursuant to Rule 28.3 of the Rules of the Supreme Court, I served three true and correct copies of the foregoing Petition for Writ of Certiorari on each counsel of record, to wit: Elizabeth B. Mattingly, 220 U.S. Courthouse, Cincinnati, Ohio 45202, John E. Schrider, Legal Aid Society of Cincinnati, 901 Elm Street, Cincinnati, Ohio 45202 and on the Solicitor General, Department of Justice, Washington, D.C. 20530, by ordinary U.S. Mail, postage prepaid, return receipt requested, on the 9th day of June, 1995. All Parties required to be served have been served.

Dated: Cincinnati, Ohio
June 9, 1995

Simon Groner
Attorney for Petitioner,
Arthur Schreiber

No. 94-2096

FILED
JUL 11 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

ARTHUR SCHREIBER,

Petitioner,

vs.

UNITED STATES OF AMERICA, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent,

-and-

TOSHIA MUNDY; WILLIAM MAYS; TAMMIE LATHAM,

Intervenors-Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF OF INTERVENORS-RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner has presented the following questions:

1) Did the Court of Appeals err as a matter of law in holding that a provision in a Settlement Agreement that defined a Renovation Period was unambiguous when it considered only one component of the definition and ignored the second conflicting component of the definition?

2) Did the Court of Appeals err as a matter of law in holding the admitting of irrelevant evidence concerning the physical condition of low income rental projects is harmless error, when the reason for this holding is based upon information derived from the improperly admitted evidence?

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Intervenors-Respondents, Toshia Mundy, et al., respectfully request that this Court deny the petition for a Writ of Certiorari for review of the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on March 14, 1995.

STATEMENT OF THE CASE

Intervenors-Respondents, low-income residents of the housing that is the subject of this litigation, do not disagree with Petitioner's presentation of the facts of this case, except they disagree with Petitioner's conclusory statement (Brief of Petitioner, p. 6) that there was an ambiguity in the Settlement Agreement. As the Sixth Circuit properly found:

> The underlying issue there is . . . whether there was a Renovation Period of six months running from February 1, 1991 after which Mr. Schreiber would be obligated to provide funds if requested by the managing agency. The Court's view is that the District Court did not err in it's [sic] conclusion. There was a discreet and discernable Renovation Period of six months running from February 1, 1991. The Settlement Period recited that the Renovation Period duration would begin on February 1, 1991 – the commencement of the Management Period. Contrary to the defendant's reading of Section 12(b), however, the Settlement Agreement does not seem to establish a mere goal of finishing the renovations in six months. The section begins with the language, "by no later than six months from the commencement of the management period" – hardly the language of aspiration – and the section concludes by naming the period the Renovation Period. And in the Management Agreement between Mr. Schreiber and Model it was specifically declared that the Renovation Period would last six months starting February 1, 1991. That is consistent with the lawsuit Settlement Agreement definition.

Opinion of the Court, pp. A-3 - A-4 of the Appendix to Petition.

ARGUMENT

The considerations governing review by the Supreme Court of the United States on a petition for writ of certiorari are set forth in Rule 10 of the Rules of the Supreme Court of the United States. Neither of the issues presented for review by Petitioner meet the criteria contained in Rule 10. Thus, there is no reason for the Court to review this case.

Rule 10 of the Supreme Court of the United States provides:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor."

One principal purpose of the Court's certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeal and state courts in issues of federal law. *Braxton v. U.S.*, 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991). In those situations in which a United States Court of Appeals has departed from the usual and accepted course of judicial proceedings, certiorari may also be granted. Rule 10 of the Supreme Court of the United States.

Here, Petitioner presents one issue of contract interpretation and one evidentiary issue. Petitioner states as his reason for seeking review by this Court the fact that he feels that he did not receive a fair hearing below, and

that he is facing financial difficulties as a result of the decisions below. Both of Petitioner's issues were presented to the Sixth Circuit Court of Appeals, fully briefed, and presented at oral argument. The Sixth Circuit ruled against Petitioner, from the bench, on both issues.

Petitioner acknowledges, at p. 9 of his petition, that "[t]his case is not a case of great national importance, nor one that raises serious constitutional issues." It is equally apparent that this case does not present a conflict between Circuit Courts of Appeals, nor is it a case in which the Sixth Circuit departed from the accepted and usual course of judicial proceedings.

In his first reason stated for granting a writ of certiorari, Petitioner contends that the Courts below misinterpreted the Settlement Agreement. This issue was fully presented at trial, and the trial court found Petitioner's position to be without merit. The issue was then fully briefed and argued to the Sixth Circuit. The Sixth Circuit likewise found Petitioner's position to be without merit. Petitioner has presented no arguments in this petition that were not included in his case below. The ruling below does not constitute a departure from standard judicial procedure, and therefore the Court should not hear this appeal.

Regarding Petitioner's claim of an erroneous evidentiary ruling, the Sixth Circuit reviewed the trial court's admission of the disputed evidence and found that the trial court had not abused its discretion. The Sixth Circuit did not hold that the exhibits in question were "completely irrelevant," as Petitioner suggests. *See* Petition For Writ Of Certiorari, page 7. The Sixth Circuit simply held

that the trial court did not abuse its discretion in admitting the exhibits as relevant under Federal Rule of Evidence 401 for background information, or, in the alternative, that if the exhibits were not relevant, their admission was harmless error. *See* Petition For Writ Of Certiorari, page A-5 of the Appendix.

CONCLUSION

Petitioner has identified no basis for the Court to grant his Petition For A Writ Of Certiorari pursuant to Rule 10 of the Supreme Court of the United States. Although he feels that the trial court reached the wrong conclusion, and that the Sixth Circuit Court of Appeals reached the wrong conclusion on appeal, this does not qualify his case for review by the Supreme Court of the United States. Petitioner's reasons for seeking review do not meet the criteria set forth in Rule 10, and for that reason this Court should deny the petition.

Respectfully submitted,

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